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NO. 86-5853

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

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86-958

LAMAR FLETCHER, PRO SE,

PETITIONER,

RECEIVED
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SUPREME COURT, U.S.

VS.

STATE OF TENNESSEE,

RESPONDENT,

SUPPLEMENTAL BRIEF IN OPPOSITION TO STATE OF TENNESSEE's PETITION FOR WRIT OF CERTIORARI

COUNSEL OF RECORD FOR RESPONDENT;

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PETITIONER - PRO SE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

LAMAR FLETCHER, PRO SE,

PETITIONER,

VS.

STATE OF TENNESSEE,

RESPONDENT,

SUPPLEMENTAL BRIEF

Comes now Petitioner, Lamar Fletcher, Pro Se, and moves this Honorable Court pursuant to Rules of the Supreme Court, Rules, 22, and 16.6 in opposition of the State of Tennessee's petition for writ of certiorari pending jurisdictional statement, that absent some evidence showing the identity of petitioner on trial in connection with being a habitual criminal is too tenuous to permit a reasonable inference of guilt ___ "the inference of the one from proof of the other is arbitrary", Tot v. United States, 319 U.S. 463, 467, 63 S.Ct. 1241, 1245, 87 L. Ed. 1519.

In the instant, the Legislature record falls even shorter of furnishing an adequate foundation for the "knowledge" presumption, leading how many other Trial Judges to make improper Jury instructions. Hughes v. Mathews, 576 F. 2d 1250 (1978).

> Criminal Law Key 307.... A conclusive presumption which relieves State of duty, to prove all elements of crime beyond reasonable doubt is unconstitutional.
>
> Criminal Law Key. 561(1).... While state has power, within constitutional limits, to define its crime as it wishes, once it has stated what combination of factors constitutes a crime it must prove each of them beyond reasonable doubt.

Giving of instructions as to rebuttable presumption under Tennessee law that evidence presented to juriors is mandatory language that under the same name shall be prima facie evidence that accused is habitual criminal coupled with exclusion of all or any physical evidence offered to show accuracy of identity to form enhancing and mitigating circumstances of being in habitual criminal status unconstitutionally relieved prosecution of proving element of specific identity necessary for habitual criminal conviction beyond reasonable doubt, T.C.A. § 39-1-804, and is impermissible, because of accused right of self-incrimination. Const. Amends. 5, 14. A conclusive presumption which relieves the state of its duty to prove all elements of the crime beyond a reasonable doubt is, therefore, unconstitutional. See, Morrissette v. United States, 342 U.S. 246, 275, 72 S.Ct. 240, 96 L. Ed. 288 (1952).

Petitioner took the stand and swore in under the Fifth Amendment (T. 68-69), So therefore the rebuttal was put in blockage because he did not want his record introduced in the original trial.

Once an accused is convicted this is a proved fact by law and the evidence introduced outlining prior convictions is a presumed fact by juriors and cannot flow from the proved fact, by using names similar in

Nature without displaying evidence to establish the identity is the same, because there is no connection from the proved fact and the presumed one and juriors have little or no understanding of the law until they are charged with the law by the presiding Judge.

In Petitioners case the Judge charged the language T.C.A. § 39-1-804 instructing a directed verdict creating a "mandatory presumption", inwhich was "irrational" and "arbitrary", and hence unconstitutional. The respondents violated their own state statute inwhich states that the names shall be the same [1] T.C.A. § 39-1-804, and if not then we fall short of prima facie evidence. The State never pronounced (2) two names throughout the habitual criminal phase, arbitrarly withholding evidence which would tend to exonerate petitioner, and by this invalidity implied petitioner was a habitual criminal, also using erroneous language from an unconstitutional statute causing the juriors to presume guilt ordering a directed verdict from the trial Judges's erroneous instructions.

Petitioner petitions this Court because their is an absence of available state corrective process throughout the prior circumstances rendering such process ineffective to protect his rights. The Tennessee Court of Criminal Appeals has shown willingness to overturn the lower Court's Judgment where the statutory language authorized judicial action, but the unconstitutional affects of the statutory language has remained unchanged. Tennessee State Courts may not effectuate that intent until the right verbal

---

1./ Tenn. Code Ann. § 39-1-804:

> In all cases where a person is charged under the provisions of this chapter with being an habitual, criminal, the record, or records, of prior convictions of such person upon charges constituting felonies, shall be admissible in evidence, but only as proof that such person is, in fact, an habitual criminal, as defined in § 39-1=801, and a judgment of conviction of any person in this state, or any other state, country or territory, UNDER THE SAME NAME as that by which such person is charged with the commission, or attempt at commission, of a felony under the terms of this chapter, shall be prima facie evidence that the identity of such person is the same.

formula appears in the statute book.

The showing of actual prejudice resulting from the constitutional violation is, Petitioner plead not guilty to all charges and counts, and proceeded to trial, out of the presence of the Jury the petitioner took the stand and swore in under his Fifth Amendment guaranteed constitutional right protecting a disclosure of his past record, because he was on parole at the time, and the stopping of the prosecution's announcement of the silence of petitioner throughout the presentation of the State's case. Wainwright v. Sykes, 97 S.Ct. 2497 (1977) the right not to incriminate oneself. The burden is on the state to secure (a) prima facie determination of identity in prior convictions, not upon the defendant to demand it, but no such instructions were given to that effect.

The prosecution announced the silence of the petitioner through his alleged co-defendant in the original trial, and upon introductory of the initiation of the second charge of the indictment, the habitual criminal phase of the trial, introduced records of a similar name of petitioner violati[illegible] State Statute T.C.A. § 39-1-804 binding petitioner from a rebuttal purpose for self-incrimination, a defense petitioner was guaranteed by the State and Federal Constitution.

The Tennessee habitual, criminal statute T.C.A. § 39-1-804 offends the principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental through the Due Process Clause. Patterson v. New York, 97 S.Ct. 2319 (1977) Supra, Speiser v. Randall, 357 U.S. 513, 523, 78 S.Ct. 1332, 1341, 2 L. Ed. 2d 1460 (1958); Leland v. Oregon, 343 U.S. 790, 798, 72 S.Ct. 1002, 1007, 96 L. Ed. 1302 (1952); Snyder v. Massachusetts, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L. Ed. 674 (1934). Such shifting of the burden of persuasion with respect to a

fact which the state deems so important that it must be either proved or presumed is impermissible under the Due Process Clause. The Due Process Clause requires that the prosecutor bear the burden of persuasion beyond a reasonable doubt only if the factor at issue makes a substantial difference in punishment and stigma.

Even if such a person was an habitual criminal as in Specht v. Patterson, 87 S.Ct. 1209 (1967) a written report could have been supplied to determine if such a person has a mental deficient, defining habitual "of the nature of a habit". So if someone has picked up a habit, something has gone wrong mentally. The psycho-analysis effects in petitioners case are not patterned, murders, thefts, and concluding in robbery. Petitioner has never been examined by a psychiatrist.

We must recognize that all of the information relied upon by the Jury to guide them in the intelligent imposition of guilt would be unavailable if information were restricted to that given in open Court by witnesses with no prior knowledge (T.105) (T. 106) subject to cross-examination. This proceeding should draw on information concerning every aspect of petitioner's life, subject to the empirical relationship between proved and presumed facts turns, as in the present case, on a variety of circumstances and on the largely unpredictable combinations in which they occur, the "as applied" approach resembles more a holding as to the sufficiency of the evidence than the "more likely than not" determination required by Leary, 2/ because regardless of rebuttable presumptions, the evil of the presumption that this Court has struck down has not that they could not be dispelled, but rather that they forced petitioner to meet inferences that could not rationally be drawn from the facts proved.

2./ 395 U.S. 6, 32-34, 44-45, 89 S.Ct. 1532, 23 L. Ed. 2d 57 (1969).

The petitioner is therefore entitled to a full judicial hearing before the magnified sentence was imposed. At such a hearing the requirements of due process cannot be satisfied by partial or niggardly procedural protections. A defendant in such a proceeding is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings. He must be afforded all those safeguards which are fundamental rights and essential to a fair trial. The termination trial reflects to hearings such as parole, and the evidence relied on has a responsibility of being accurate or offends the preponderance of evidence standard.

The Tennessee Department of Corrections is overcrowded with Inmates such as petitioner , who were illegally and unconstitutionally indicted, convicted and sentenced under this illegal law making process. 3/ The habitual criminal Act is void because it was held void on its face as in the Application of Boyd, 189 F. Supp. 113 (1959). Rhea v. Edwards, D.C., 136 F. Supp. 671 In the Boyd case, the Court held that the Tennessee habitual criminal act in its original form as enacted in 1939 was unconstitutional. In 1950 the act was amended and re-enacted by the Legislature in the 1950 Code Supplement. This statute has had several violative Due Process Sections, but over the years has been amended and repealed, inwhich is also in violation of State and Federal Constitutional Laws.

Legislature History

3./ The habitual criminal statute in Chapter 22 of the Public Acts of 1939 was passed February 14, 1939 by Hlan R. Maxwell, Speaker of the Senate and John ED O'Dell, Speaker of the House of Representatives then (7) seven days later February 21, 1939 Approved by Prentice Cooper, Governor of the State of Tennessee causing

continued on next page

Petitioner argues that the State presented one Jacket throughout his trial and the habitual criminal was stamped on its face. In bifurcated trials "trial of issues separetly" e.g. guilt and punishment, there would have to be (2) two slots on the face of the Jacket for the verdict. Petitioner has complained to the Board of Professional Responsibility after subsequential conviction and Trial counsel responded it was a "Dummy Jacket". In reference to the record the FOREMAN responded, your Honor, I wrote the verdict up there, I think in the wrong spot, and I put it down and I think it's in the proper position on the Jacket. (T. 92)

In Respondents Petition on page (4) they state that in the habitual criminal phase of the trial showing a "continuous" trial, they introduced records that showed a person by the same name of petitioner had previously been convicted. Prior convictions indictment No. 37982, 37984, 38885, 39623, 41825, 47124, 47125, and 47126 is transcribed to be Lamar Fletcher, but the original indictment shows (2) two names Lamar Fletcher, also known as, Lamarr Fletcher and their was never an explanation put before the juriors or even a calling of (2) two names throughout the bifurcated trial, and by the records reflecting (2) two similar names inwhich no evidence was ever put before the Jury to establish the accuracy in identity. Identity is an "element" of the status and merely a displaying of a record is not a rational connection between the proved fact and the presumed one. The prosecution say that 39. 804 of the Tennessee Code say the records of the Clerk's Office is Prima facie evidence of identity and that's all we really have

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continued from previous page

It to be void on its face being that no State Statute, Municipal Ordinance, Custom or Policy can be approved by the Tennessee Government into legal effect until after enactment by the Legislature and then put before the Election Commissioner for the people's approval in affirmative by a one man - one vote decision as in Cummings v. Beeler, 223 S.W. 2d 913. The respondents have violated Tennessee constitution Article 11, Section 3 omission of the people's vote, Tennessee constitution Article 1, Section 1 and Section 1 of the Declaration of Rights, the power resides in the people to "alter, reform or abolish" the Tennessee Constitution not in the Legislature. The people are possessed with ultimate sovereignty and are the source of all State authority.

to put on. (T. 106)

Petitioner asserts with no prior knowledge as to accuracy of identity this statute creates an unlawful mandatory presumption and is unconstitutional. The trial judge erroneously instructed the defense counsel that he can object to the charge, but that's what the law says. (T. 107) Petitioner's claim was timely because it was objected to at the conclusion of the proof-in-chief of the State's case and also asserted in his motion for new trial and now before this Honorable Court.

In Tennessee the Sixth Amendment and Section 6 of the Act guarantees the right to trial by Jury to determine the status of accused in the habitual criminal phase of the proceedings. In this instant the reasonable - doubt standard should apply because the Jury is the Judge to determine the law, because identity is an element of the charge, offense or status one falls under, causing the State of Tennessee to go beyond the constitutional limits in securing convictions.

The Legislature has construed a statute declaring an individual guilty or presumptively guilty of a crime, or seperate offense, using names identical or similar of accuses' inwhich is unconstitutional. McFarland v. American Sugar Rfg. Co., 241 U.S. 79, 86 (36 S.Ct. 498, 500, 60 L. Ed. 899) (1916). The Legislature cannot "validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt". Tot v. United States, 319 U.S. 463, 469 (63 S.Ct. 1241, 1246, 87 L. Ed. 1519) (1943). Patterson, 432 U.S., at 210, 97 S.Ct., at 2327. This statute was declared unconstitutional in 1959 on its face.

Tennessee Criminal Court of Appeals directs that on remand, the trial Court, after charging the Jury in accord with T.C.A. § 39-1-804, must instruct the Jury on the permissive inference as follows. 4/ This instruction language will result in a permissive presumption still, because without some due process standards "preponderance of evidence" the Jury will presume by the prosecution's presentment that once guilty always guilty. The petitioner would be subjected to another Fifth Amendment violation after being convicted under a statute constructed with mandatory language causing a directed verdict, because once die is cast to go back would subject petitioner to a second prosecution violative of the "double Jeopardy" clause. Const. Amends. 5, 14.

CONCLUSION

In Petitioner's case the conclusion is opposite McMillan v. Pennsylvania, 106 S.Ct. 2411 (1986), enactment of the habitual criminal statute in Tennessee altered the Maximum sentence and created a seperate penalty that was for the Jury's determination. To hold the juriors from a fair and efficient adjudication to these proceedings would be to deprive petitioner of the Constitutional provisions of Due Process, guaranteed by State and Federal Law. These proceedings were to determine the background or character of petitioner's criteria for such a status. Under the provisions of the Due Proceds Clause, the petitioner should have

---

4./ Prima Facie evidence as outlined in the statute means that you, the jury, may, but need not, infer from the evidence that the defendant and the individual named in the prior convictions are the same.

been afforded the consideration by a preponderance of the evidence to establish the identity as to prior convictions just to reasonably infer the accuracy of clear and convincing evidence.

In essence to let this statute stand would be a dishonor to our Constitutional laws authorizing prosecutors in the State of Tennessee to arbitrarly enhance accused punishment to life without being afforded any provisions of due process or at least in petitioner's instance procedural due process. In Shelby County the judiciary system is set up where mostly everyone indicted under the habitual criminal statute goes before one Judge, Joseph P. McCartie and only in his Court Room, titled Major Violators, this invidious discrimatory process cannot award individuals an opportunity at a fair trial. When entering this Court Room it is well established that one is an habitual criminal or affiliated with one. The constitutional limits to the State's power are exceeded by the Habitual Criminal Act.

Petitioner also asserts that his conviction for robbery is purely circumstantial with uncorroborated and inconsistency in testimonies, and request this court upon the Granting of the writ to award a totalty of the circumstance test as his Application for Extraordinary Appeal displayed in the Criminal Court of Appeals of Tennessee. Also upon the Granting of the writ the petitioner is requesting oral argument.

Respectfully Submitted,

Mr. Lamar Fletcher

Mr. Lamar Fletcher #100663

ORIGINAL

LAMAR FLETCHER, PRO SE,

Petitioner,

~~86-5853~~

VS.

STATE OF TENNESSEE,

Respondent,

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SUPREME COURT, U.S.

86-938

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner Lamar Fletcher, Pro Se, asks leave to file the attached petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner has previously been granted leave to so proceed in both the Criminal Court of Shelby County and the Criminal Court of Appeals. Application for permission to appeal in the Supreme Court of Tennessee was denied per curiam. Petitioner's affidavit in support of this motion is attached hereto.

/s/ Mr Lamar Fletcher
Mr. Lamar Fletcher #100663

AFFIDAVIT

I, Lamar Fletcher, being first duly sworn according to law, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay Fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said case or give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceedings in this Court are true:

1. Are you presently employed?
   a. NO.... March 26, 1985 is the date of my last employment at Huey's automotive 666 Breedlove, Memphis, TN., and salary per-week was $200 + commission.
2. Have you received within the past twelve months any income from business, profession or other form of self-employment, or in the form of rent payment, interest, dividends or other sources?
   a. NO.
3. Do you own any cash or checking or savings account?
   a. NO.

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?
   a. NO.
5. List the persons who are dependent upon you for support and state your relationship to those persons.
   a. My daughter, Carol Ann Fletcher, inwhich is and will reside in Chicago, Ill., with my parents until my situation changes.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

/s/ Mr. Lamar Fletcher
Mr. Lamar Fletcher #100563

Subscribed and sworn to before
me this 10 day of November, 1986.

Notary: Glenda Sue Stead

My Commission Expires: September 23, 1990

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

LAMAR FLETCHER, PRO SE,

PETITIONER,

VS.

STATE OF TENNESSEE,

RESPONDENT,

PROOF OF SERVICE

STATE OF TENNESSEE)
) SS.
COUNTY OF DAVIDSON)

LAMAR FLETCHER, after being duly sworn, deposes and says that pursuant to Rule 28.2 of this Court he served the within SUPPLEMENTAL BRIEF IN OPPOSITION TO STATE OF TENNESSEE'S PETITION FOR WRIT OF CERTIORARI TO THE OFFICE OF THE CLERK, SUPREME COURT OF THE UNITED STATES, at WASHINGTON, D.C. 20543 and on counsel of record for respondents by enclosing a copy thereof in an envelpoe, mailed to:

Mr. Jerry L. Smith
Deputy Attorney General
450 James Robertson Parkway
Nashville, TN. 37219-5025
(615) 741-2216

and depositing same in the United States mails at Nashville, Tennessee on 15th December, 1986.

Mr. Lamar Fletcher

Mr. Lamar Fletcher #100663

Subscribed and sworn to before me this 12 day of December, 1986.

Notary: [signature] My Commission Expires; My Commission Expires Oct. 24, 1988